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Can Dieting Lead to DUI Arrests?

By: **Gerri L. Elder**

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In the United States, where obesity is a nationwide epidemic, the weight loss industry is booming. There is no shortage of new diets and diet programs being marketed. Anyone who wants to lose weight and avoid the many serious potential health problems caused by obesity has plenty of choices.

A new report by lawyer Daniel Jaffe in the American Chronicle points out a dieting pitfall that has nothing to do with losing weight. According to Jaffe, some diets can cause legal problems.

A recent trend in dieting involves low carb intake, while including plenty of protein in food choices. Jaffe says that this type of diet plan can lead to DUI arrests and even convictions.

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When a DUI suspect takes a breath test, the machine measures a group of molecular compounds in the breath sample. The problem is that the breath test machines do not always register just alcohol content.

For people who are on high protein and low carb diets, certain compounds in the breath samples can be mistaken by the breath test as alcohol. This can result in a false breath test reading for people who have not been drinking before driving, or a higher blood alcohol content reading for people who have consumed some alcohol prior to testing.

Because breath test results are often the centerpiece of DUI prosecutions, these false readings can cause innocent people to be convicted of DUI charges.

In people who are fasting, or following the Atkins diet or other severely restrictive diets, acetone can be present in the breath sample taken during a breath test. Acetone can be recorded by the breath test as alcohol content and give a false or inflated blood alcohol content reading.

When a person is suspected of DUI, the arresting officer generally has reason to believe that they are driving under the influence of drugs or alcohol. Simply telling an officer that a diet is to blame would not be a viable excuse for erratic driving or other conduct leading to a DUI arrest.

For people who believe their diet has caused a false blood alcohol content reading on a breath test, it may be helpful to request that a blood sample be taken.

In a blood test, acetone does not register as alcohol content and a true blood alcohol reading can be established. Therefore, in order to prove innocence in a DUI case, it may be essential that a blood sample be taken from a dieting DUI suspect as soon as possible.

At DUI trials, most prosecutors rely heavily on breath test evidence as the proven method to establish guilt and get DUI convictions. Since most people are unaware that dieting can lead to a false breath test reading, blood test results may be essential to establish innocence in some cases.

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« Florida Admits Breathalyzers "Unreliable"
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Dieting Can Cause High Breathalyzer Results

Posted by Lawrence J. Farber on October 23rd, 2006

I've written in the past about how most so-called "breathalyzers" do not measure alcohol: they actually measure the presence of a molecular group in compounds. Ethyl alcohol (aka ethanol) contains the group, and so when the machine detects its presence (or, more accurately, an infrared beam is absorbed by it), it simply assumes that the detected compound must be ethyl alcohol.

Problem: there are thousands of compounds containing the molecular group — of which well over one hundred have been found on the human breath. Breathing gasoline or paint fumes, for example, or merely absorbing the fumes through the skin, can create false breath test results for days. And I've posted in the past that the problem is particularly acute when the suspect happens to be a diabetic, as diabetics often have high levels of *acetone* in their breath — a compound which contains the group.

However, you do not need to be a diabetic to have high levels of acetone. Scientific research has established that acetone can exist in perfectly normal individuals at levels sufficient to cause false high breath-alcohol test readings. "Excretion of Low-Molecular Weight Volatile Substances in Human Breath: Focus on Endogenous Ethanol", 9 *Journal of Analytical Toxicology* 246 (1985).

Fasting or radical dieting, such as with the Atkins diet, can also cause significantly elevated acetone. Studies have concluded that fasting, for example, can increase acetone in the body sufficient to obtain breathalyzer readings of .06% (this is cumulative — that is, the .06% will be added by the machine to any levels actually caused by alcohol or other compounds, so that a true breath alcohol of .03%, for example, would be reported by the machine as .09%). "The Likelihood of Acetone Interference in Breath Alcohol Measurement", 3 *Alcohol, Drugs and Driving* 1 (1987). And low-carbohydrate diets, such as Atkins, have long been associated with high levels of acetone production.

Of course, for many years law enforcement denied that any such problem existed, just as they denied that "mouth alcohol" and radio frequency interference caused false test results — until manufacturers started adding acetone detectors, mouth alcohol detectors and RFI detectors to their machines (none of which, unfortunately, have proven reliable.)

How reliable are breathalyzers? Not very (see "How Breathalyzers Work" and "Why They Don't" and "Close enough for government work"). As I've recently posted, there appears to be a growing trend toward letting officers draw blood themselves at the scene of arrest. Given the reassurances about these machines so often expressed publicly by law enforcement, one has to wonder why they are turning to the involved process of hypodermic needles, preservatives, anticoagulants, refrigeration and delayed laboratory analysis....

This entry was posted on Monday, October 23rd, 2006 at 4:32 pm and is filed under [DUI Blog](#). You can follow any responses to this entry through the [RSS 2.0 feed](#). You can also [reply](#), or [trackback](#) from your own site.

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1. [...] And "police officials" don't know what they are talking about. Most "breathalyzers" have the same problem as ignition interlock devices: they are non-specific for ethyl alcohol — that is, they can't distinguish between ethyl alcohol and thousands of other chemical compounds, among them ketones. See my earlier posts, "Why Breathalyzers Don't Measure Alcohol" and "Dieting Can Cause High Breathalyzer Results". [...]

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alcohol concentration by measuring the electrical reaction caused by alcohol oxidation.

Unfortunately, PAS devices react to rubbing alcohol, wood alcohol and acetone. This skews the test results for some diabetics, people who are fasting and people whose professions expose them to certain chemicals.

Another major problem with PAS tests is that they do not have mouth alcohol detectors to determine if mouth alcohol is present. Mouth alcohol is the undetected, raw, unabsorbed alcohol in the mouth that falsely elevates the results of the breath test. The sources of mouth alcohol may include a substance ingested prior to the breath test, a substance regurgitated or burped from the stomach, dental work or a case of gastroesophageal reflux, also known as GERD.

There is no time period that the officer must wait before administering the PAS test. Science has proven that alcohol evaporates from the mouth in 15 minutes, so if a person refrains from eating anything or regurgitating any fluids for 15 minutes, there will be no residual alcohol in the mouth. However, PAS tests do not have this time requirement. Thus, with no time requirement and no slope detector, BAC readings from PAS tests often report an inaccurate BAC reading, which results in the police officer making an arrest for DUI.

PAS devices must be properly calibrated and maintained to assure the accuracy of its readings. Police agencies must keep detailed records of the maintenance schedule. PAS devices often have to be checked every 150 tests, or 10 calendar days. Therefore, a lawyer should get the past records of the PAS device to check for any issues with the device and to check for a pattern of suspicious test results.

If you or a loved one was arrested for DUI, please contact a skilled defense attorney immediately.

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DEFENDANT'S ACID REFLUX DISEASE KNOCKS OUT BREATH TEST IN DUI CASE

May 15, 2003

By Steven P. Garmisa
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Gastroesophageal reflux disease provided a winning defense against a drunken driving charge. *People v. Bonutti*, 2003 WL 1795702 (5th Dist., April 4).

Boris Bonutti was pulled over by an Illinois State Police trooper for speeding in Effingham County. According to Officer Richard Largen, Bonutti was arrested after flunking field sobriety tests.

Largen then drove Bonutti to the county sheriff's office, where he was administered a breath-alcohol test. The results showed a blood-alcohol level of 0.174 percent, and Bonutti's driving privileges were immediately suspended.

The state also filed a two-count information accusing Bonutti of driving under the influence of alcohol, and driving with an alcohol level of 0.08 percent or more.

The key question -- in both a civil case seeking rescission of the summary suspension and the criminal case -- was whether Bonutti regurgitated within 20 minutes of the breath test. This apparently affects the accuracy of alcohol breath tests.

Section 11-501.2 of the Illinois Vehicle Code provides for admission of breath-alcohol tests in civil and criminal cases. The Department of State Police is also authorized to issue regulations designed to help make the tests accurate.

Exercising this authority, the department issued a regulation that states:

"The following procedures shall be used to obtain a breath sample to determine a subject's [breath-alcohol concentration] with an approved evidentiary instrument:

"(a) Prior to obtaining a breath analysis reading from a subject, the [breath analysis operator] or another agency employee shall continuously observe the subject for at least 20 minutes.

"(1) During the 20-minute observation period the subject shall be deprived of alcohol and foreign substances and shall not have regurgitated or vomited.

"(2) If the subject regurgitates or vomits during the observation (deprivation) period, the process shall be started over by having the individual rinse the oral cavity with water.

"(3) If the individual continues to regurgitate or vomit, alternate testing shall be considered." 20 Ill. Adm. Code [sec]1286.310 (2001).

According to Bonutti's testimony at the rescission hearing, he has esophageal reflux disease, which causes stomach acid to rise up the esophagus and into the throat. The backup of stomach acid into the throat causes a burning sensation and can feel like a heart attack. To help control acid reflux, Bonutti takes the medication Prilosec. Bonutti testified he suffered an attack of acid reflux in the 20 minutes before the breath test. Although he didn't tell anybody at the police station about the reflux, he asked for a glass of water to relieve the discomfort. The request was denied.

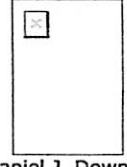
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J. Dillon Hoey
1941-2003



James L. Farina



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